(2)

No. 87-31

In The
Supreme Court of the United States
October Term, 1987

FORD MOTOR CREDIT COMPANY, a corporation,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
Respondent,

and

JOHN STRIBLING FORD, INC., a corporation,
Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL L. WILLIAMS
WILLIAMS & TROUTWINE, P.C.
1100 Standard Plaza Building
1100 Southwest Sixth Avenue
Portland, OR 97204-1020
Telephone: (503) 295-2924

Counsel of Record for
Real Party in Interest

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

11 pp

QUESTION PRESENTED

The Real Party in Interest does not agree with the statement of the question presented by Petitioner. The question, more precisely stated, is: whether a district court has discretion to remand a properly removed case to state court after all federal claims have been eliminated on the motion of the party resisting remand, and when such remand will not waste judicial resources or unduly burden the parties with duplicative discovery or delay in trial date.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-31

In The
Supreme Court of the United States
October Term, 1987

FORD MOTOR CREDIT COMPANY, a corporation,
Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
Respondent,

and

JOHN STRIBLING FORD, INC., a corporation,
Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Real Party in Interest, JOHN STRIBLING FORD, INC., respectfully prays that the Court deny Petitioner's writ of certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit entered April 3, 1987.

OPINIONS BELOW

The Real Party in Interest adopts the Opinions below as set forth by Petitioner as accurate.

———o———

JURISDICTION

The Real Party in Interest adopts the Statement of Jurisdiction as set forth by Petitioner.

———o———

STATUTES INVOLVED

The Real Party in Interest adopts the Statutes Involved as set forth by Petitioner.

———o———

STATEMENT OF THE CASE

The Real Party in Interest agrees with the Statement of the Case as set forth by Petitioner.

———o———

REASONS FOR DENYING THE WRIT

1. The present case does not pose the forum shopping problem of Cohill; here, the parties resisting remand themselves chose to eliminate the federal claims well before trial.

This Court has granted certiorari in *Carnegie-Mellon University v. Cohill,* (No. 86-1921) cert. granted 107 S. Ct. 1283, 94 L. Ed.2d 141 (1987), which presents the question

of "[w]hether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 USC Subsection 1447(c)—i.e., elimination, by amendment of the complaint, of the federal claim that had formed the basis of removal . . ." *Cohill* Brief at i.

Cohill raises the problem of forum shopping; the case at bar does not.

The plaintiffs in *Cohill* voluntarily amended their complaint to eliminate the federal claims and simultaneously moved for remand. These actions permit the inference that the plaintiffs may have wrongfully manipulated the forum in which the litigation would be conducted.

There is a long-standing policy against such manipulation because it wastes the resources and time of the judiciary and litigants. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 287 (1938).

In the present case, the federal claims were eliminated as a result of defendants' motion for summary judgment, not some manipulation by plaintiff. Then, once those federal claims were dismissed, the district court, in remanding the case, simply followed the unequivocal policy elaborated in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), which requires that "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.*

In *Cohill* the policy requiring federal courts to avoid needless decisions of state law collides with the policy against allowing a party to manipulate pleadings and procedure in order to avoid or create federal jurisdiction. In

the instant case, there is no such policy conflict. Rather, the only policy issue was resolved in accordance with this Court's holding in *Gibbs* in that the district court decided not to retain jurisdiction.

Because *Gibbs* was not a removal/remand case, but one filed originally in federal court, the only alternative to the district court's retaining jurisdiction of the state claims in that case was dismissal. However, the policy and factors set forth in *Gibbs*—judicial economy, convenience and fairness to litigants—would support remand as well, under the proper circumstance. (The district court here expressly considered these factors and found that remand was clearly fair and efficient.) In fact, to require dismissal instead of remand would be a waste of the litigants' time and resources and a triumph of form over substance. *See, e.g., Wren v. Sletten Const. Co.*, 654 F.2d 529 (9th Cir. 1981).

2. Thermtron did not reverse UMW v. Gibbs; the district courts still must exercise discretion to avoid unnecessary decisions of state law, sometimes leading to remands for grounds neither expressly authorized nor expressly prohibited by 28 U.S.C. Sec. 1447(c).

Petitioner relies heavily on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), for the proposition that a case may only be remanded upon the grounds set forth in 28 U.S.C. Sec. 1447(c), specifically, cases "removed improvidently and without jurisdiction." This is an incorrect reading. Rather, *Thermtron* holds that cases so remanded are not reviewable under 28 U.S.C. Sec. 1447 (d) while cases remanded on other grounds are reviewable. *Id.* at 350.

While the Court in *Thermtron* did state that Congress probably never intended to extend "carte blanche authority" to the district courts on the issue of remand, *id.* at 351, it did not state that no other grounds for remand would be acceptable. It simply held that the ground given in *Thermtron,* i.e., an overcrowded docket as a basis for remand of both federal and state claims to state court, was reviewable, and upon review, unacceptable.

Circuit Court cases reading *Thermtron* as permitting remand only upon the grounds stated in 28 U.S.C. Section 1447(c), *e.g., Ryan v. State Board of Elections of State of Illinois,* 661 F.2d 1130 (7th Cir. 1983) and *Levy v. Weissman,* 671 F.2d 766 (3rd Cir. 1982), are factually similar to *Thermtron* in that the reasons given for remand were not grounded upon *any* proper authority. However, in a case where these were good reasons to remand, and the authority to remand was well-grounded in case law, the Fifth Circuit approved remand "based on clearly articulated authority." *IMFC Professional, Inc. v. Latin American Home Health, Inc.,* 676 F.2d 152 (5th Cir. 1982). As that Court said, abstention and pendent jurisdiction are two such authorities and "the discretionary element that inheres in [pendent jurisdiction] allows remand of non-federal issues." *Id.* at 159.

The Fourth and Sixth Circuits also allowed remand upon the proper authority of pendent jurisdiction. *In re Romulus Schools,* 729 F.2d 431 (6th Cir. 1984) (remand proper in cases of pendent jurisdiction without reliance upon statute); *Fox v. Custis,* 712 F.2d 84 (4th Cir. 1983) (although the District Court is permitted to dismiss state claims once federal claims are dismissed, fairness and expediency permit remand to state court.)

The holdings in *IMFC, Romulus* and *Fox* are not in conflict with *Thermtron;* they are just factually dissimilar. The present case is akin to *IMFC, Romulus* and *Fox* in that remand was based on the district court's proper authority to exercise discretion in pendent jurisdiction situations.

—o—

CONCLUSION

The Petition should be denied.

Respectfully submitted,

MICHAEL L. WILLIAMS
Counsel of Record for Real Party in Interest

July 27, 1987.

MICHAEL L. WILLIAMS
WILLIAMS & TROUTWINE, P.C.
1100 Standard Plaza Building
1100 Southwest Sixth Avenue
Portland, OR 97204-1020
Telephone: (503) 295-2924

Counsel of Record for Real Party in Interest